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**JBM Janitorial Maintenance, Inc. and Service Employees International Union Texas.** Case 16–CA–201387

May 4, 2018

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS PEARCE  
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that JBM Janitorial Maintenance, Inc. (the Respondent) has withdrawn its answer to the complaint. Upon a charge filed by Service Employees International Union Texas (the Union) on June 26, 2017, the General Counsel issued a complaint against the Respondent on October 23, 2017, alleging that it has violated Section 8(a)(3) and (1) of the National Labor Relations Act. The Respondent filed an answer on November 6, 2017. However, by email dated February 7, 2018, the Respondent withdrew its answer to the complaint.

On March 6, 2018, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On March 13, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. However, proper service of the Notice to Show Cause was not achieved. Accordingly, the Board issued a Supplemental Notice to Show Cause on March 29, 2018. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Default Judgment**

Section 102.20 of the Board’s Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is received on or before November 6, 2017, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Although the Respondent timely filed an answer on November 6, 2017, it later withdrew that answer.<sup>1</sup> The withdrawal of an answer has the same effect as failure to file an answer, i.e., the allegations in the

<sup>1</sup> On February 7, 2018, the Respondent sent Counsel for the General Counsel an email stating: “[I] would like to with draw [sic] the answer filed on November 6, 2017. Case 16–CA–201387.”

complaint must be deemed admitted to be true.<sup>2</sup> Accordingly, based on the withdrawal of the Respondent’s answer, we deem the allegations of the complaint to be admitted as true, and we grant the General Counsel’s Motion for Default Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent has been a Texas corporation with an office and place of business in Houston, Texas, and has been engaged in the business of providing janitorial services.

In conducting its operations during the 12-month period ending December 31, 2016, the Respondent provided services valued in excess of \$50,000 to customers outside the State of Texas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and we find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Mary Ann Guillen	—	Human Resources and Cleaning Supervisor
Viridiana Garcia	—	Owner
Rafael Martinez	—	Cleaning Supervisor
Cecil Martinez	—	Contract Supervisor

About April 13, 2017, the Respondent’s employee Cesar “Paola” Hernandez engaged in concerted activities for the purpose of mutual aid or protection by filing a wage theft complaint with the City of Houston.

About April 18, 2017, Hernandez engaged in concerted activities for the purpose of mutual aid or protection by speaking at a Houston City Council meeting about the wages, hours, and working conditions of the Respondent’s employees.

About May 19, 2017, the Respondent discharged Hernandez because she engaged in the concerted activities described above, because she assisted the Union, and to discourage employees from engaging in these or other concerted activities.

<sup>2</sup> See *Maislin Transport*, 274 NLRB 529 (1985).

## CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed under Section 7 of the Act and discriminating in regard to hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Hernandez, we shall order the Respondent to make Hernandez whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Hernandez for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>3</sup>

In addition, we shall order the Respondent to compensate Hernandez for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 16 allocating backpay to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also be required to remove from its files any and all references to Hernandez' unlawful discharge

and to notify Hernandez in writing that this has been done and that the unlawful conduct will not be used against her in any way.

The remedy for this violation would ordinarily also include an order requiring the Respondent to offer full reinstatement to Hernandez within 14 days from the date of our Order. However, in light of the fact that the Respondent has ceased operations, we shall not order the immediate reinstatement of Hernandez. Instead, we shall order the Respondent, in the event that it resumes the same or similar business operations, to offer Hernandez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

Finally, in view of the fact that the Respondent's facility is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

## ORDER

The Respondent, JBM Janitorial Maintenance, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(b) Discharging or otherwise discriminating against employees because they engage in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the event the Respondent resumes operations, offer Cesar "Paola" Hernandez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Cesar "Paola" Hernandez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Compensate Cesar "Paola" Hernandez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

<sup>3</sup> The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers' International Union of North America Local 91 (Council of Utility Contractors, Inc.)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Cesar "Paola" Hernandez, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, duplicate and mail at its own expense, and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"<sup>4</sup> to the Union and to the last known addresses of all employees who were employed by the Respondent at any time since May 19, 2017. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 4, 2018

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John F. Ring, Chairman

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Mark Gaston Pearce, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

#### MAILED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, in the event we resume operations, offer Cesar "Paola" Hernandez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Cesar "Paola" Hernandez whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Cesar "Paola" Hernandez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Cesar "Paola" Hernandez, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

JBM JANITORIAL MAINTENANCE, INC.

The Board's decision can be found at [www.nlr.gov/case/16-CA-201387](http://www.nlr.gov/case/16-CA-201387) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

